In the Supreme Court

OF THE

United States

OCTOBER TERM 1976

No. 76-971

ANDRE WILLIS KING,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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The Petitioner, Andre Willis King, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered on December 16, 1976.

OPINION BELOW

The Court of Appeals entered its opinion on December 16, 1976. A copy of the opinion, affirming the judgment of conviction is attached as Appendix "A".

JURISDICTION

Jurisdiction of this court is invoked under Title 28, U.S.C., Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. *Whether the Court of Appeals erred in concluding, on a question of first impression, that the confrontation clause of the Sixth Amendment and Due Process Clause of the Fifth Amendment were not violated by the introduction of the depositions of precipient witness-government informants, taken at the government's insistence, in a foreign country, under highly restrictive conditions, and as to which the trial court did not allow objections at time of trial.*

2. *Did the Court of Appeals err in affirming the trial court's refusal to give a requested cautionary instruction as to the limited admissibility of co-conspirators' statements, in a multiple defendant conspiracy case, where the bulk of the evidence consisted of hearsay statements of co-conspirators; and where such holding is in clear conflict with all circuits which have addressed this question.*

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution of the United States, Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in

> the Militia, when in actual service in time of War of public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of the United States, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Title 18 U.S.C. Section 3503. The statute provides in full:

> §3503. Depositions to preserve testimony
>
> (a) Whenever due to exceptional circumstances it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved, the court at any time after the filing of an indictment or information may upon motion of such party and notice to the parties order that the testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the

same time and place. If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the court on written motion of the witness and upon notice to the parties may direct that his deposition be taken. After the deposition has been subscribed the court may discharge the witness. A motion by the Government to obtain an order under this section shall contain certification by the Attorney General or his designee that the legal proceeding is against a person who is believed to have participated in an organized criminal activity.

(b) The party at whose instance a deposition is to be taken shall give to every party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time or change the place for taking the deposition. The officer having custody of a defendant shall be notified of the time and place set for the examination, and shall produce him at the examination and keep him in the presence of the witness during the examination. A defendant not in custody shall have the right to be present at the examination, but his failure, absent good cause shown, to appear after notice and tender of expenses shall constitute a waiver of that right and of any objection to the taking and use of the deposition based upon that right.

(c) If a defendant is without counsel, the court shall advise him of his rights and assign counsel to represent him unless the defendant elects to proceed without counsel or is able to

obtain counsel of his own choice. Whenever a deposition is taken at the instance of the Government, or whenever a deposition is taken at the instance of a defendant who appears to be unable to bear the expense of the taking of the deposition, the court may direct that the expense of travel and subsistence of the defendant and his attorney for attendance at the examination shall be paid by the Government. In such event the marshal shall make payment accordingly.

(d) A deposition shall be taken and filed in the manner provided in civil actions, provided that (1) in no event shall a deposition be taken of a party defendant without his consent, and (2) the scope of examination and cross-examination shall be such as would be allowed in the trial itself. On request or waiver by the defendant the court may direct that a deposition be taken on written interrogatories in the manner provided in civil actions. Such request shall constitute a waiver of any objection to the taking and use of the deposition based upon its being so taken.

(e) The Government shall make available to the defendant for his examination and use at the taking of the deposition any statement of the witness being deposed which is in the possession of the Government and which the Government would be required to make available to the defendant if the witness were testifying at the trial.

(f) At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used if it appears: That the witness is dead; or that the witness is out of the United States, unless it

appears that the absence of the witness was procured by the party offering the deposition; or that the witness is unable to attend or testify because of sickness or infirmity; or that the witness refuses in the trial or hearing to testify concerning the subject of the deposition or part offered; or that the party offering the deposition has been unable to procure the attendance of the witness by subpoena. Any depositions may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, an adverse party may require him to offer all of it which is relevant to the part offered and any party may offer other parts.

(g) *Objections to receiving in evidence a deposition or part thereof may be made as provided in civil actions.* (Emphasis added).

STATEMENT OF THE CASE

Petitioner was convicted of conspiracy and substantive drug offenses with three others not parties to this petition.[1] The offenses and parties were tried together—the first trial resulting in a hung jury and mistrial as to petitioner; the second trial resulting in the conviction of petitioner on the three counts charged against him.

[1]Petitioner received sentences totalling twenty-five years and is presently incarcerated at McNeil Island Federal Penitentiary under those sentences.

A. Depositions

In order to establish petitioner's complicity in the charged offenses, the government took the depositions of two precipient witnesses, who testified under grants of immunity, at Yokosuka Prison in Yokosuka, Japan. The deponents' testimony was deemed "crucial" by the government and was admitted, over defense objection, at both trials. The Court of Appeals affirmed the convictions holding that the deposition provision of 18 U.S.C. §3503 was facially valid and that the depositions taken here, while under conditions less than ideal, did not suffer from constitutional infirmities.

Petitioner and his co-defendants were charged with a conspiracy to import heroin from Thailand via Japan into the United States. Two of their alleged accomplices, Gamble and Adams, had been convicted of narcotic offenses in Japan, and were, at the times relevant to this case, serving prison terms in a Japanese prison in Yokosuka, Japan. The prosecution sought and obtained permission, under the provisions of 18 U.S.C. §3503, to depose these persons at the prison. The depositions were, after several changes, scheduled to commence on January 21, 1975.

On October 25, 1974, the government filed a notice of and motion for the taking of depositions of Gamble and Adams in Japan pursuant to 18 U.S.C. §3503 (C. 12-24).[2] The government alleges that Gamble and

[2]Abbreviation code:
C—Clerk's transcript on appeal
R—Reporter's transcript on appeal
DTA—Deposition Transcript Adams
DTG—Deposition Transcript Gamble

Adams would be imprisoned until 1977 and 1978 (C. 15), and that the purpose of the depositions would be to obtain testimony of "crucial witnesses" in the case (R. 85 1/10/75) for "use at the trial" (C. 19).

On October 31, 1974, Defendants filed objections to the depositions (C. 25-42, 55-56) charging *inter alia,* that the prerequisites to allowing a deposition under 18 U.S.C. §3503 had not been met, i.e., no "exceptional circumstances" and that the depositions were not "in the interests of justice," (see, e.g., C. 32-35) and, most importantly, that the depositions would deny defendants their rights to confrontation and due process under the Fifth and Sixth Amendments (e.g., C. 47-49).

The court ordered the depositions taken (C. 57-60), after expressing uncertainty as to their constitutionality (R. 5-11, 1/1/74) or the inability of the government to bring Adams and Gamble to the United States (C. 20, 1/1/74). The court further ordered the depositions videotaped and the costs be borne by the government.

Inititally, the place for the taking of the depositions was to be the United States Air Force base at Yokosuka, Japan (R. 39-40, 11/15/74). This was subsequently changed to Yokosuka Prison itself (C. 189-190, 193). The government also demanded that defendants travel to Japan together (C. 187-188, 192-194). Nothing was stated at that time concerning defendants' freedom of movement in Japan, or of defendants' freedom to communicate with their counsel during the course of the depositions.

The final date for the taking of the depositions was set for January 21, 1975. The Japanese government required that defendants arrive together in the country no sooner than January 20, 1975 (R. 66, 1/10/75, C. 187-188, 192-194). Counsel objected stating that they and defendants needed time in Japan prior to the taking of depositions in order to conduct investigations—especially because the deponents would not be available for cross-examination at trial. The court agreed and stated that defendants should be given three days in Japan to prepare prior to the commencement of the depositions (R. 85, 1/10/75). The court would not, however, grant a formal order delaying the depositions until January 24, 1975.

In the three weeks immediately preceding the depositions further increasingly restrictive conditions were imposed on the defendants. In response to these restrictions, the government consistently stated to the court that it (the government) had no control over the Japanese government (R. 78, 1/10/75); and the court in turn stated that it would take these matters up at the time the government moved for the admission of the depositions (R. 78-79, 1/1/75). On December 31, 1974, defendants were told the deposition would be taken inside a Japanese prison (C. 189-190, 202). Around *January 2, 1975,* the defendants were told they would have to travel together to Japan and arrive no sooner than January 20, 1975 (C. 192-194, 202). On January 8, 1975, defendants' counsel learned that defendants would be met at the airport and taken under, then as yet unidentified escort, to a hotel near

the prison (C. 202, 215-16). The "itinerary" of defense *counsel* was demanded on January 18, 1975 (C. 215-216). On January 15, it was indicated that defendants would be required to stay in the same hotel (C. 215-216, 322). Despite defendants' continued objections that they could not adequately prepare under these conditions, the court persisted in ordering the depositions. (E.g., C. 219-220).

Upon *arrival* at Tokyo International Airport defendant's counsel was hand delivered a letter from an official of the American Embassy, Tokyo (C. 280). This letter set forth further restrictive conditions upon the taking of the depositions and specifically upon the freedom and movement of defendants during the taking of the depositions (C. 325-326), none of which had been specified or known prior to arrival in Japan. This letter was the *first* indication that the defendants' freedom of movement in Japan would be *absolutely* curtailed (C. 280). In effect, the defendants would be under arrest while in Japan. Further counsel for petitioner was advised there was no possibility that defendants and their counsel would be given the three days to prepare (C. 281)—as the Japanese government was fearful of a political incident arising from the defendant's presence in Japan. A consular official stated that the Japanese government was requiring extensive security personnel to be placed at the hotel, at the airport, and at the prison. The Embassy officer also stated that the defendants would be required to stay *in* their hotel rooms. He advised that the defendants would be taken from the hotel

to the prison every morning and returned from the prison to the hotel every night, that they would be guarded around the clock by Japanese security personnel, and that they would not be allowed any free movement in Japan. He further stated that were any defense counsel to interview the deponents, Japanese officials would be present during the interview (C. 281).

The defendants' hotel rooms had been prepared by the Japanese government and the American Embassy. The rooms had no telephones, and were located in a part of the hotel which allowed the Japanese government to maintain round-the-clock surveillance; guards were posted in the hallways outside of the doors and outside the windows. A police "command post" was set up next to defendants' rooms and contained much electronic equipment. The defendants were told that they were not allowed to leave their rooms; that they had to take their meals in their rooms; and that they were not allowed to visit their attorneys in the attorneys' rooms. The attorneys were told that they were allowed to visit the defendants and speak to them *only* in the defendants' rooms (C. 283). Subsequently defendants were allowed in the attorneys' rooms under the same conditions of visitations which applied to their rooms.

Defendant's counsel did not, for fear of electronic surveillance, discuss this case with petitioner in the room which had been prepared for petitioner by the Japanese government and the American Embassy. The same applied to counsel's room. The defendants were

not allowed to make any phone calls within Japan nor generally allowed to leave the rooms. On one occasion, they were allowed to make overseas phone calls in the presence of numerous Japanese policemen (C. 283). Counsel objected vigorously, at every opportunity, to these conditions (C. 283).

All defense counsel, considering the language difficulties, the geographic unfamiliarity, jet lag, and the other intimidating circumstances surrounding the depositions felt, at that time—the night of defendants' arrival, that participation in the depositions would be meaningless in that their ability to aid the defendants in cross-examination had been almost totally emasculated (C. 284). However, counsel and defendants remained three more days in an attempt to get the conditions modified.

At no time, during the entire course of the depositions, were there less than twenty-two members of various Japanese police forces present, either at the prison or at the hotel (C. 284). The defendants were under total arrest at the hotel except for the period of time when they were taken under police escort to the prison and participated in the depositions (C. 284). Once again it is stressed that *none* of these above specific restrictions, including the threat of imprisonment hanging over the defendants' heads if they refused to comply with these conditions, was known to either the defendants or to the defense counsel *prior* to coming to Japan (C. 284).

In summary, defendants arrived the evening before the commencement of the depositions after a 14-hour

plane trip, crossing the International Date Line and suffering from jet lag. They were immediately surrounded by numerous Japanese police and American Embassy security personnel. They were whisked off to the Hotel where they were placed under arrest in rooms that had been prepared for them—rooms completely denuded of any communication facilities. They were then made to conform to an incredibly rigid schedule, which was inflexible, which required that the depositions begin at a particular time and end at a particular time, regardless of where the questioning was at the time of the break. The atmosphere was intimidating and oppressive. Numerous objections by defense counsel went unanswered and rapidly became totally futile gestures. Most importantly, the defendants were not allowed free and secure opportunities to talk to their attorneys. The attorneys, likewise, could not be sure that it was safe to talk to each other or their clients in the hotel and certainly not safe to talk at the prison.

The actual depositions proceeded as follows: the defendants were taken to Yokosuka Prison, taken into a Defendant's Room, and then taken upstairs to the Deposition Room and at all times surrounded by numerous Japanese prison guards (C. 286). There were at all times Japanese prison and security personnel in the room as well as American Embassy personnel (C. 286). Counsel were all unanimously of the opinion that it was likewise unsafe to speak with the defendants as to substantive matters concerning the case while at the prison. The rooms had been provided at the prison according to a predetermined

plan, and counsel could never be sure whether or not anything that they might say might be overheard (C. 286).

These conditions were objected to at length at the beginning of the deposition of deponent Adams (e.g., D.T.A. 7-28).

In order to perfect the record as to these events, counsel requested that the hearing officer take the stand and make a statement concerning the above described events and the Embassy's role in the depositions. He refused to do so (D.T.A. 30-32, C. 287). The same request was made of the United States Attorney who likewise refused (D.T.A. 32-33, C. 287).

A defense investigator tried to obtain information relevant to cross-examination at the depositions. He was unable to obtain any information due to the inability of the defendants to communicate with him, their counsel, or with persons they (the defendants) knew in Japan (C. 328-329).

The depositions themselves were a mockery of judicial proceedings. The hearing officer stated he was "incompetent" to direct proceedings or make procedural rulings (R. 208, 4/29/75), and refused to allow *voir dire* or order the production of documents —even in the face of defense objections that this testimony was in effect trial testimony. (E.g., D.T.A. 110 *et seq.*, 124).

On Friday, January 24, 1975, (JST), after some examination of deponent Adams, counsel once again objected to certain restrictions, more specifically: the

fact that the defendants could not securely and privately confer with their counsel, that counsel could not be introduced to persons in Japan who knew defendants as no time had been allowed to investigate, and that the defendants were not allowed to accompany counsel or even use the phone for "in-country" calls (C. 291, D.T.A. 524-530). Defendants, through counsel, asked the hearing officer to communicate these objections to the Embassy and Japanese government. After lunch, on the 24th, the hearing officer stated:

> "The proceedings are continued at 1:26 p.m. after a brief recess during which time, at the request of defense counsel, I contacted my supervisors at the American consul general to ask if he had received an answer from the Japanese government concerning the lifting of restrictions on defendants and he advised me that since the lunch hour when I contacted him initially he had been in touch with the Ministry of Foreign Affairs at high levels and they replied as follows:
>
> 'That the Japanese government, in its own interests and in the interests it protects of its citizens and country considers that surveillance and *absolute control* over the defendants is required.'"
>
> [Emphasis added] (D.T.A. 568).

At this point the defendants and defendants' counsel withdrew from the proceedings and returned to the United States.

The government then completed its deposition of Adams (D.T.A. 560 *et seq.*) and went on to depose

Gamble (D.T.G. 3-107). Significant portions of Adams' deposition and all of Gamble's deposition were taken in the *absence* of all defendants and defendants' counsel. Adams' deposition, with all but substantive questions and answers edited out, was videotape played to the juries at both trials (R. 200 *et seq.*, 4/29/75; R. 182 *et seq.*, 5/27/75). Gamble's deposition was played in its entirety at both trials (R. 62 *et seq.* 4/28/75; R. 335 *et seq.*, 5/27/75). The depositions were played to the jury in both trials with all procedural objections based on constitutional considerations made at the time of the depositions deleted. (Compare D.T.A. 1-570 with R. 200-641, 4/29/75).[3]

The court prohibited counsel from commenting on the circumstances surrounding the deposition to the jury (R. 35-37, 4/28/75; R. 87-88, 4/29/75; R. 1246-1253, 5/27/75). The court prohibited counsel from commenting on the absence of cross-examination of deponent Gamble (R. 442-443, 5/28/75). The court prohibited counsel from raising evidentiary objections to questions in Gamble's deposition (R. 60, 77-82, 4/28/75; R. 335, 5/27/75).

Defendants made continuing and vigorous objections to the introduction of the depositions at the first trial. Further objections were made during the second trial with all pre-trial and first trial objections incorporated *in toto* (C. 145-146, 5/15/75).

[3]A small number of questions posed by the government and answers given by deponent Adams were stricken upon the sustaining of evidentiary objections, by the District Court, of objections made by counsel *during* the depositions (C. 435-440).

Two jury trials, each lasting approximately two and one-half weeks, were held. The basis of the government's case against petitioner centered around the deposition testimony of Adams and Gamble.

Adams testified that he knew all the defendants (R. 200-203, 4/29/75). Most importantly, that he had heard petitioner's co-defendant Powell state that he (Powell) and petitioner were "50/50" partners in the drug deals in question (R. 303-305, 4/29/75). Adams also testified to deliveries of drugs to Powell while petitioner was present, and of assistance given by petitioner to Powell in obtaining drugs (R. 237-244, 248-249, 253-257, 273-278, 287-288, 303-305, 4/29/75). Even on the limited cross-examination of Adams he was shown to have lied in prior sworn statements (R. 458-574, 4/30/75).

Gamble testified that he knew all the defendants (R. 337-338, 5/27/75). He also testified he aided Powell in the transport of drugs to the United States. He testified that petitioner had aided Powell in helping Gamble transport drugs to the United States. Gamble also testified that petitioner was at least present at certain times and places when drugs were picked up in the United States.

With one minor exception, Adams and Gamble were the *only* government witnesses who testified as to any direct involvement by petitioner in any drug dealings. Although the government attempted to have petitioner identified by other witnesses none could do so.

B. Curative Instruction

During the first trial petitioner repeatedly requested a curative instruction be given regarding the admissibility, under the co-conspirator exception to the hearsay rule, of extra-judicial statements made by one co-defendant incriminating another co-defendant. Petitioner's counsel requested that the curative instruction be given during the videotape testimony of Gamble:

> "Mr. Topel: You'll not even give the curative instruction as to hearsay as somebody else, somebody coming in subject to the co-conspiracy exceptions?"
> "The Court: That's correct."
> "Mr. Topel: You wouldn't even give that?"
> "The Court: Your understanding is correct."
> (R. 79:7-12, 4/28/75)

"Mr. Topel: I am again going to request that before the tape begins playing again that you give the curative instruction that anything that one co-conspirator says implicating another cannot be used by the jury—should not be considered by the jury in determining whether the other person is a member of the conspiracy until and unless independent evidence shows that he is a member of the conspiracy. Because throughout the Gamble deposition there are a lot of statements attributed not only from Gamble, but to the *other* defendants which implicate defendant King." [Emphasis added].

"The Court: I'll give the instruction at the end—the conclusion of the trial."

(R. 149:9-25, 4/29/75).

Later, during the testimony of one Charles Stevens, the curative instruction was again requested (R. 751:10-19, 5/5/75). The request was denied (R. 751:20, 5/5/75). Petitioner's counsel then entered a continuing exception to the failure to give the instruction (R. 751:21-24, 5/5/75). The curative instruction was again requested during the testimony of Drug Enforcement Agency Agent Lionel Stewart (R. 968-970, 5/6/75). The trial court intimated that such a curative instruction might be given later in the trial (R. 969-970, 5/6/75). This point was discussed later that day (R. 999-1002, 5/6/75), but the trial judge finally concluded that he would not give the curative instruction (R. 1017-1019, 5/6/75). The appellant objected to this refusal (R. 1019:17-23, 5/6/75).

At the second trial, just after the jury was empaneled, the trial court offered to read to the jury the instructions on conspiracy. Defense counsel objected. The same instructions given at the first trial were given at the second trial, with a few additions (R. 445:8-11, 5/28/75; R. 998-1005, 6/23/75). Again, the "statements of a co-conspirator" instruction was given in the same separated fashion (R. 1210-1211; R. 1216:1-9, 6/4/75) and only at the end of the trial. *All* objections made to the giving or omitting of jury instructions at the *first* trial were deemed re-stated and were incorporated for the second trial (R. 1234:19-24, 6/4/75).

The first trial ended in a mistrial as to petitioner on all counts. During the second trial, after being in deliberation two days, the jury asked to have read

back those portions of Gamble's deposition testimony, given in the absence of defendants, covering his being given heroin in a girdle to take to the United States (R. 1248, 6/6/75). These were the main portions of Gamble's testimony concerning petitioner. Over defense objections (R. 1249, 1250, 6/6/75), those portions, and only those portions, were read to the jury (R. 1251). A few moments later, the jury returned with verdicts of guilty as to petitioner on all counts.

REASONS FOR GRANTING THE WRIT

1.

The confrontation issue presented here; of whether depositions taken at *government* request, in a foreign country, under highly restrictive conditions, may be admissible in a criminal trial in the United States is one of first impression in this or any other State or Federal Court. The resolution of this question has impact beyond this immediate case—under the recently promulgated changes in the Federal Rules of Criminal Procedure, Rule 15 for the first time allows government depositions to be taken in all types of criminal cases. Thus the confrontation issues presented here under 18 U.S.C. 3503's deposition section will bear heavily on issues arising under Rule 15's deposition provisions.

The Court of Appeals recognized, as it had to, that this court has never authorized the use of *depositions*

in lieu of trial testimony. In every instance where prior recorded testimony was held admissible it was testimony given at a prior judicial proceeding—either a preliminary hearing or prior trial. See, e.g., *Mattox v. United States,* 156 U.S. 237 (1895) (prior trial); *Mancusi v. Stubbs,* 408 U.S. 204 (1972) (prior trial); *California v. Green,* 399 U.S. 149 (1970) (preliminary hearing); *Barber v. Page,* 390 U.S. 719 (1968) (preliminary hearing).

While this court has held that prior testimony may be admissible it has set extremely high standards circumscribing such admissibility. In *Green* this court stated confrontation is satisfied if the prior testimony is given under circumstances which:

> (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth"; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

California v. Green, 399 U.S. 149, 158 (1970) (citation omitted).

Green and other confrontation cases set forth two other additional criteria; first that the prior testimony be given in circumstances "closely approximating trial, and second, that the nature and scope of cross-examination not be limited in any significant way. *(Green, supra,* at 161).

While petitioner would argue that depositions can never meet confrontation requirements—and thus 18 U.S.C. 3503 *and* Rule 15 F.R.C.P. would be facially invalid—it is unnecessary to reach that question to resolve the issue in this case. Assuming *arguendo,* that under certain conditions depositions could be constitutionally valid in criminal cases, the depositions here did not meet minimal constitutional standards.[4]

The Court of Appeals in upholding the introduction of the depositions under the facts of this case stated that since there were no restrictions on *counsel's* ability to move about Japan and since counsel had "adequate" time to investigate no infringement on the right to effective representation occurred. In so stating the Court of Appeals ignored the uncontradicted factual record.

Until immediately prior to their departure for Japan, defendants and their counsel were *not* aware that the defendants would be placed in highly restrictive custody in Japan. And not until *after* arrival in Japan did defendants and their counsel learn that no time would be allowed for pre-deposition investigation in Japan and that defendants would not even be allowed "in-country" phone calls.[5]

Thus counsel's reliance on petitioner's familiarity with the language and relevant locales in Japan to

[4]Neither the two other 3503 deposition cases decided prior to this case involved the factual background and restrictive circumstances found herein. See, *United States v. Ricketson,* 498 F.2d 367 (7th Cir. 1974); *United States v. Singleton,* 460 F.2d 1148 (2d Cir. 1972).

[5]This notwithstanding the District Court's express wish that counsel be allowed at least 3 days lead time in Japan to prepare.

assist in the pre-deposition investigation was frustrated at the last moment by last minute restrictions. Further, counsel were told they would be given time upon arrival in Japan to investigate. No time at all was allowed.

It is no answer, as the Court of Appeals would argue, that there is no right in the United States for defendants "to be freed to assist in pretrial investigation efforts" (slip op. at p. 13). In the United States there are normally no language barriers and ample contacts through defendants with persons who may have relevant information. Here petitioner was not even allowed to make "in-country" phone calls to assist counsel in meeting other persons.

Counsel further couldn't discuss the information developed during the depositions with the petitioner. The hearing room was close and cramped with sensitive video microphones placed all about the room. The hotel rooms abutted the Japanese security command post—which was filled with electronic equipment. The waiting room at the prison abutted rooms filled at all times with security personnel. Discussions between counsel and petitioner at the hotel were ***at all times*** under direct visual-close proximity observation of a Japanese security officer.[6]

[6]The Court of Appeals disingenuously distinguishes the recent case of *Geders v. United States,* 425 U.S. 80 (1976) as being inapposite, construing *Geders* as applying only to the trial context. (Slip Op. at p. 12 n,9). These depositions were taken and could only have been taken, in *lieu* of *trial* testimony. That is why depositions were authorized. The depositions here were part of the trial, indeed they formed the backbone of the government's case.

The depositions themselves were a mockery of a judicial proceeding. The hearing officer described himself as "incompetent" and refused to rule on objections. The depositions were held in a cramped tight crowded room, where counsel could not confer privately with petitioner.

Finally the Court of Appeals construed *Green* to mean that so long as counsel could *ask* any questions cross-examination was not limited in any significant way. Such a niggardly reading of *Green's* language is violently inconsistent with this court's concern for due process and confrontation rights of the accused. Effective representation and confrontation is much more than merely the physical opportunity to ask questions. It is at the very least the right to ask informed and intelligent questions—based on an adequate opportunity to investigate and discuss testimony with the accused. The Court of Appeals construction of the *Green* language is indeed a triumph of form over substance and should not be allowed to stand.[7]

A resolution of the difficult confrontation and due process questions—of first impression—posed by the facts of this case is needed. A writ of certiorari should issue.

[7]The Court of Appeals also found that since no constitutional deprivation occurred, petitioner's withdrawal from the depositions worked a waiver. (Slip Op. at p. 16). Petitioner argued that there was no right to waive as no meaningful right to confront was offered. Thus the "waiver" question is ultimately determined by the existence *vel non* of constitutional infirmities in the deposition circumstances.

2.

The Court of Appeals ruling that the trial court did not err in refusing to give a cautionary instruction limiting the admissibility of co-conspirators' statements absent proof *aliunde* of the conspiracy and a specific defendant's participation in such conspiracy is in conflict with the holdings of the other circuits which have addressed this issue. The Fifth Circuit in *United States v. Apollo,* 476 F.2d 156, 162 (5th Cir. 1973), the Seventh Circuit in *United States v. Buschmann,* ..... F.2d ..... (7th Cir. 1976); and the First Circuit in *United States v. Honneus,* 508 F.2d 566 (1st Cir. 1974) have held that in a multi-defendant conspiracy case a cautionary instruction must, upon request, be given.

Here such request was repeatedly made and denied. The Court of Appeals in rejecting the "*Apollo*" rule cited to an inapposite case—*Carbo v. United States,* 314 F.2d 718 (9th Cir. 1963). *Carbo* held that the judge determined the question of whether co-conspirators' statements could be used against other co-conspirators. *Carbo* did *not* concern itself with the problem addressed in *Apollo*—the need for a cautionary instruction to the *jury* that statements introduced before that preliminary determination had limited admissibility.

A conflict now exists between the Ninth Circuit and the other three circuits which have reached this question.[8]

[8]Co-conspirators' statements are no longer defined as hearsay. F.R.E. 801 (d)(2)(E). However, their admissibility against persons other than the declarant would still require the same proof *aliunde* as before and thus a cautionary instruction would still be required.

CONCLUSION

Resolution of both questions presented is necessary and important. A writ of certiorari on both questions should issue.

Dated, January 5, 1977

Respectfully submitted,
MARCUS S. TOPEL,
WILLIAM L. OSTERHOUDT,
By MARCUS S. TOPEL,
Counsel for Petitioner.

(Appendix "A" Follows)

APPENDIX A

Appendix "A"

United States Court of Appeals
for the Ninth Circuit

United States of America, Plaintiff-Appellee, vs. Andre Willis King, Defendant-Appellant.	No. 75-2424
United States of America, Plaintiff-Appellee, vs. Fred Neil Powell, Defendant-Appellant.	No. 75-2934

[December 16, 1976]

Appeal from the United States District Court
for the Northern District of California

Opinion

Before: Barnes, Choy and Kennedy, Circuit Judges.
Choy, Circuit Judge:

Andre Willis King and Fred Neil Powell appeal from multiple-count convictions for conspiracy to commit and for the commission of narcotics offenses. We affirm.

BACKGROUND

King and Powell were indicted with two others, Kearney and Lemon, in an eight-count indictment

charging various violations of 21 U.S.C. §§ 841(a), 846, 959, and 963. In particular, King was charged with conspiracy to import heroin illegally into the United States and to possess and distribute heroin (Count One) and with unlawful distribution of heroin intended for importation into the United States (Counts Three and Four). Powell was charged with conspiracy (Count One), with unlawful distribution of heroin intended for importation into the United States (Counts Three, Four, and Five), and with distribution of heroin (Count Eight). The indictment accused King, Powell, Kearney, and Lemon, as well as several unindicted co-conspirators, of engaging in a scheme to obtain heroin in Thailand, transport it through military cargo channels to Japan, and reship the heroin in a variety of ways from Japan to the United States for ultimate unlawful sale and distribution. Further detailed description of the activities and the evidence will be referred to where specifically relevant to issues on appeal.

Jury trial commenced in the district court on April 28, 1975. After a two and one-half week trial, Powell was convicted of Count Eight and Lemon was convicted of three counts. After three days of deliberation, the jury was unable to reach a verdict as to the other counts and defendants. As to those a mistrial was declared and a second jury trial commenced two days later. The second jury found King and Powell guilty as to all remaining counts.[1]

[1]Kearney was acquitted on one count; all others were found guilty.

Between them King and Powell raise six issues. Numbers one through five apply to King and are discussed in his brief. Powell's brief adds a sixth, and Powell also adopts by reference the arguments presented in King's brief as to numbers one and five.

ISSUES

1. Was the district court's admission into evidence of the depositions of two absent witnesses erroneous as a denial of King's and Powell's rights of confrontation, effective assistance of counsel, and due process?

2. Did the district court err in denying King's motion for severance?

3. Did the district court err in refusing King's request for a cautionary instruction during the trial regarding the admissibility of statements under the co-conspirator exception to the hearsay rule?

4. Did the district court abuse its discretion in rereading a portion of a witness' testimony to the jury?

5. Are the convictions of King and Powell for violating 21 U.S.S. § 959 (unlawful manufacture or distribution of a controlled substance for purposes of unlawful importation) unconstitutional since Congress' legislative authority does not properly reach their activity outside the United States.

6. Was the evidence insufficient to support Powell's conviction on Count Eight?

DISCUSSION

A. *Use of Deposition Testimony under 18 U.S.C. § 3503*

A key component of the Government's case rested on the testimony of two unindicted co-conspirators, Adams and Gamble. They were not available to testify at trial since both were serving terms of imprisonment at Yokosuka Prison in Japan for Japanese narcotics law offenses.[2] The Government thus submitted their testimony in the form of videotaped depositions with a stenographic transcript.

The depositions were taken pursuant to 18 U.S.C. § 3505, adopted in 1970.[3] Section 3503(a) provides

[2]Subpoenas were served upon Adams and Gamble at Yokosuka Prison in Japan, but the prison warden would not permit the deponents to travel to the United States to honor the subpoenas.

[3]The statute provides in full:

§ 3503. Depositions to preserve testimony

(a) Whenever due to exceptional circumstances it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved, the court at any time after the filing of an indictment or information may upon motion of such party and notice to the parties order that the testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place. If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the court on written motion of the witness and upon notice to the parties may direct that his deposition be taken. After the deposition has been subscribed the court may discharge the witness. A motion by the Government to obtain an order under this section shall contain certification by the Attorney General or his designee that the legal proceeding is against a person who is believed to have participated in an organized criminal activity.

(b) The party at whose instance a deposition is to be taken shall give to every party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time or change the place for taking the deposition.

that a court may order testimony for a criminal action to be taken by deposition "[w]henever due to exceptional circumstances it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved," and subsection (f) permits

The officer having custody of a defendant shall be notified of the time and place set for the examination, and shall produce him at the examination and keep him in the presence of the witness during the examination. A defendant not in custody shall have the right to be present at the examination, but his failure, absent good cause shown, to appear after notice and tender of expenses shall constitute a waiver of that right and of any objection to the taking and use of the deposition based upon that right.

(c) If a defendant is without counsel, the court shall advise him of his rights and assign counsel to represent him unless the defendant elects to proceed without counsel or is able to obtain counsel of his own choice. Whenever a deposition is taken at the instance of the Government, or whenever a deposition is taken at the instance of a defendant who appears to be unable to bear the expense of the taking of the deposition, the court may direct that the expenses of travel and subsistence of the defendant and his attorney for attendance at the examination shall be paid by the Government. In such event the marshal shall make payment accordingly.

(d) A deposition shall be taken and filed in the manner provided in civil actions, provided that (1) in no event shall a deposition be taken of a party defendant without his consent, and (2) the scope of examination and cross-examination shall be such as would be allowed in the trial itself. On request or waiver by the defendant the court may direct that a deposition be taken on written interrogatories in the manner provided in civil actions. Such request shall constitute a waiver of any objection to the taking and use of the deposition based upon its being so taken.

(e) The Government shall make available to the defendant for his examination and use at the taking of the deposition any statement of the witness being deposed which is in the possession of the Government and which the Government would be required to make available to the defendant if the witness were testifying at the trial.

(f) At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used if it appears: That the witness is dead; or that the witness is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or that the witness is unable to attend or testify because

the use of such deposition at trial if, among other reasons, "the witness is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition . . . ." The district court admitted the depositions into evidence on this basis. The statute also provides, in subsection (b), that:

> A defendant not in custody shall have the right to be present at the examination, but his failure, absent good cause shown, to appear after notice and tender of expenses shall constitute a waiver of that right and of any objection to the taking and use of the deposition based upon that right.

Under submission (d), the scope of examination and cross-examination allowed is as broad as would be allowed at trial itself, and the deposition is taken and filed as in civil actions. *See* Fed.R.Civ.P. 28, 30.

The depositions were set at Yokosuka Prison, and defendants (then on bail) and their attorneys traveled to Japan to participate at government expense. The Japanese government was uneasy about the entire project, however, and it imposed several restrictions. It required that the defendants arrive together no

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of sickness or infirmity; or that the witness refuses in the trial or hearing to testify concerning the subject of the deposition or part offered; or that the party offering the deposition has been unable to procure the attendance of the witness by subpoena. Any depositions may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, an adverse party may require him to offer all of it which is relevant to the part offered and any party may offer other parts.

(g) Objections to receiving in evidence a deposition or part thereof may be made as provided in civil actions.

See also Fed.R.Crim.P. 15 (depositions).

earlier than January 20, 1975, and that the depositions begin the next day, though defense counsel protested that more time was needed to investigate and prepare for cross-examination. Defendants were taken from the airport to rooms prepared for them and they were guarded throughout their entire stay. They were confined to their rooms except for the trips to the prison for the deposition sessions, and they were not allowed to telephone or otherwise communicate with anyone else in Japan. They and their room were frequently searched. They could confer with their attorneys initially only in their own rooms, but subsequently in counsel's rooms as well. There were also rooms set aside for consultation purposes at the prison. The defendants and their attorneys could not speak privately with the deponents prior to their examinations, and a rigid daily schedule was set for the depositions.

Defense counsel vigorously objected to these conditions, and American consular officials attempted to have them relaxed, but the Japanese government would not relent. Claiming that the circumstances were intolerable, defendants and their counsel withdrew on the fourth day during the Adams' deposition and returned to the United States. The Government continued under the restrictions, taking the remainder of Adams' deposition and all of Gamble's after the defense's departure.

Back before the district court, the defendants moved to exclude the depositions. The motions were denied. The deposition videotapes were played to the

jury in both trials with all constitutional objections made at the time of taking deleted. The court prohibited defense counsel from commenting to the jury either on the circumstances of the depositions or on the absence of cross-examination of Gamble. Nor were they allowed to raise evidentiary objections to questions in Gamble's testimony, their failure to appear and assert them at the deposition being taken as a waiver.

Appellants here raise three objections: (1) that the use of deposition testimony of witnesses absent at trial, as authorized by § 3503, is unconstitutional on its face; (2) that such use in the circumstances of this case is unconstitutional; and (3) that their departure from the deposition was not an effective waiver.

1. Facial Constitutionality of 18 U.S.C. § 3503

Appellants argue that the Supreme Court has never expressly authorized, for sixth amendment confrontation purposes, the use of an absent witness' deposition in lieu of trial testimony. While that may be true, the Court has observed that, at least since *Mattox v. United States,* 156 U.S. 237 (1895), "prior-recorded testimony has been admissible in appropriate cases." *Mancusi v. Stubbs,* 408 U.S. 204, 213 (1972). Instances where such evidence has withstood sixth amendment scrutiny include testimony given at an earlier trial *(see, e.g., Mancusi, supra)* or at a preliminary hearing (*see, e.g., California v. Green,* 399 U.S. 149 (1970)) where the defendant was represented by counsel who had the opportunity to conduct an effective cross-examination.[4]

We consider here a federal statute entitled to a strong presumption of constitutionality. *See United States v. Watson,* 423 U.S. 411, 416 (1976), *quoting United States v. Di Re,* 332 U.S. 581, 585 (1948). Two other circuits have considered the confrontation question in the context of § 3503, and both have rejected constitutional challenges as to the use at trial of such despositions. *United States v. Ricketson,* 498 F.2d 367 (7th Cir.), *cert. denied,* 419 U.S. 965 (1974); *United States v. Singleton,* 460 F.2d 1148 (2d Cir. 1972), *cert. denied,* 410 U.S. 984 (1973). *See also United States v. Carter,* 493 F.2d 704 (2d Cir. 1974). We agree with these holdings.

[4]Dying declarations have also long been admissible without offending confrontation principles, this even despite the lack of cross-examination. *See, e.g., Mattox, supra. See also* Fed. R. Evid. 804(b)(2) (statement under belief of impending death).

In his scholarly concurrence to *Green,* Justice Harlan analyzed the then extant confrontation opinions of the Supreme Court. *Green,* 399 U.S. at 172-89. After a review of the common law antecedents to the constitutional confrontation doctrine, Justice Harlan concluded that underlying the operative principle of the right of confrontation was an *availability* rule, "one that requires the production of a witness when he is available to testify." *Id.* at 182. The harmonization of the holdings explained both the dying declaration exception and the refusal to except prior recorded testimony when the witness is still available to testify. *Id.* at 182-83. *Compare id.* at 162 (opinion of the court). He cited West v. Louisiana, 194 U.S. 258 (1904), as one of the opinions which both justified his rationale and "anchored it in precedent." In *West,* the Court considered the use of deposition testimony at trial. The issue, however, was whether the there instant state procedures complied with the due process command of the fourteenth amendment. The sixth amendment question was not specifically dealt with, though the admission of the testimony was affirmed. The *West* opinion emphasized availability of the witness as the unifying link in the earlier federal precedents, rather than cross-examination.

In Pointer v. Texas, 380 U.S. 400, 406 (1965), the Supreme Court held the sixth amendment right of confrontation applicable to the states by virtue of the fourteenth amendment.

In *Mancusi,* the Court characterized its concern under the confrontation clause as being

> to insure that there "are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant," *Dutton v. Evans,* [400 U.S. 74, 89 (1970)], and to "afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement," *California v. Green,* [399 U.S.] at 161.

408 U.S. at 213. Confrontation meets the need for adequate reliability and evaluation in that it

> (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth"; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

California v. Green, 309 U.S. 149, 158 (1970) (citation omitted). In *Green,* testimony given at the defendant's preliminary hearing was admitted under § 1235 of the California Evidence Code as substantive evidence at trial. The evidence was held to satisfy the protection of interests guaranteed by the confrontation clause because the prior-recorded testimony was given under oath, defendant was represented by counsel—indeed, the same counsel who later represented him at trial—and was able to cross-examine the witness, and the proceedings were conducted before a judicial tribunal equipped to provide a record of the hearing. *Id.* at 165.

The Court regarded the testimony as admissible "wholly apart from the question of whether [the defendant] had an effective opportunity for confrontation at the subsequent trial."[5] *Id.* The Court reasoned that though a preliminary hearing is "ordinarily a less searching exploration into the merits of a case than is a trial," *id.* at 166, had the the declarant been unavailable at trial without state connivance, the confrontation clause would not have been offended by admission of the hearsay testimony. The right of cross-examination afforded at the earlier hearing provided "substantial compliance with the purposes behind the confrontation requirement . . . ." *Id. See Barber v. Page,* 390 U.S. 719 (1968).

We think the *Green* rationale controls the resolution of the present issue. A deposition taken under § 3503 satisfies the procedural safeguards required by the confrontation clause.[6] The section by its terms is limited to "exceptional circumstances" where, in the interest of justice, it is necessary to take and preserve

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[5]This language has been labeled mere dicta and it has been criticized. *See* United States v. Singleton, 460 F.2d 1148, 1155-59 (2d Cir. 1972) (Oakes, J., dissenting), *cert. denied,* 410 U.S. 984 (1973); 8 J. Moore, Moore's Federal Practice ¶ 15.02[3], at 15-27 & n.40 (2d ed. 1976). But while the *Ricketson* court considered the language "at best an alternative holding," 498 F.2d at 374, as a separate subdivision of a majority opinion, we agree with the *Ricketson* panel that we are not at liberty to depart from its import.

[6]We limit our scrutiny to the provisions of § 3503 employed to authorize the depositions in the instant case. We therefore intimate no opinion with respect to provisions not relevant herein.

testimony away from the trial court.[7] 18 U.S.C. § 3503 (a). Use of the testimony at trial as substantive proof is permitted only if it appears that the witness meets one of several "unavailability" criteria.[8] The section incorporates provisions of the Federal Rules of Civil Procedure to govern criminal depositions. Federal Rule of Procedure 30(c) requires an authorized person to put the deponent on oath. Defendants have the right to be present during the deposition and to be represented by counsel. 18 U.S.C. § 3503(c). The scope of examination is as would be allowed at full trial. *Id.* The rules permit depositions taken in foreign countries before persons authorized either by the law thereof or of the United States, Fed.R. Civ.P. 28(b), and require the recording of the testimony. *Id.* 30(c). The entire procedure is under the authority and general supervision of the trial court. Finally, depositions generally expose the deponent to rigorous cross-examination on all issues, rather than the limited question of probable cause as in the *Green* preliminary hearing.

The Supreme Court has emphasized that "the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that the trier

[7]Motions by the Government to obtain a deposition order under § 3503 must contain certification by the Attorney General or his designee that the instant proceeding is against someone believed to have participated in organized criminal activity. 18 U.S.C. § 3503(a).

[8]These include the witness' death, absence from the United States (unless the absence was procured by the party offering the deposition), sickness or infirmity, refusal to testify at trial with respect to the deposition's subject or part offered thereof, or the inability of the offering party to procure attendance by subpoena. 18 U.S.C. § 3503(f).

of fact [has] a satisfactory basis for evaluating the truth of the prior statement." *Dutton v. Evans,* 400 U.S. 74, 89 (1970), *quoting Green* at 161. We believe that the procedures for depositions taken and admitted at trial pursuant to § 3503 provide the trier of fact with a satisfactory basis for truth evaluation consistent with both accurate truth determination and practical considerations for the administration of justice. Accordingly, we hold that the statute is not facially unconstitutional.

2. Unconstitutionality of 18 U.S.C. § 3503 As Applied

Appellants also argue that there were unconstitutional defects in the particulars of these depositions. Specifically they allege: that the deponents were under no effective oath and were without fear of a potential perjury prosecution; that the videotape presentation of the deponents' testimony was inadequate to let the jury observe the demeanor of the witnesses; and that the "oppressive, intimidating and frightening" conditions at the deposition proceedings in Japan constituted a denial of effective cross-examination, representation of counsel, and due process.

a. *The Oath.* Appellants argue that no valid oath was administered to the deponents, such that they could "lie with impunity." We disagree. Both deponents were sworn in by First Secretary and Consul of the United States Embassy, Tokyo, Japan, who presided as hearing officer. Secretaries of embassy and consular officers are authorized to administer oaths and take depositions. 22 U.S.C. § 1203. *See also* 22

C.F.R. §§ 92.4, 92.49 *et seq.*, Consular Convention and Protocol of March 23, 1963 between the United States of America and Japan, 15 U.S. Treaties & Other Int'l Agmnts. 768, 795 (1964) (permitting consular officers to take depositions on behalf of the sending state). Section 3503 incorporates the federal rules governing civil depositions, 18 U.S.C. § 3503(d), which, in turn, permit depositions taken before persons authorized to administer oaths in the place where the examination is held. Fed.R.Civ.P. 28(b)(1).

The commission of perjury when under oath in a deposition taken, as here, before a secretary of embassy or consular officer is punishable "in the same manner, in all respects, as if the offense had been committed in the United States . . . ." 22 U.S.C. § 1203. The federal perjury and false declaration statutes also specifically apply to extraterritorial testimony under oath where authorized, as here, for the proceedings. 18 U.S.C. §§ 1621, 1623. We conclude that the deponents were validly under oath and subject to the penalties for perjury.

b. *Videotape and Demeanor Evidence.* Appellants urge that the admission of the deposition evidence was in any case erroneous because the use of videotape testimony cannot provide an adequate opportunity to observe demeanor. We think this argument misses the focus of the *Green* analysis. It is true that a photographic or electronic presentation is not a perfect substitute for live testimony on the witness stand. But confrontation does not require perfect presentation and availability of demeanor evidence to the trier

of fact; the loss of some demeanor evidence that would have been relevant to resolving questions of credibility does not violate confrontation rights. 399 U.S. at 160.

Appellants further argue that videotape presentation is also defective because the picture portrays only the witness and not counsel. Constitutional interests are served, however, by a somewhat narrower scope of vision. The Court reasoned in *Green* that one of the objectives of confrontation is to permit the jury deciding a defendant's fate "to observe the demeanor of the *witness* in making his statement, thus aiding the jury in assessing his credibility." *Id.* at 158 (emphasis added).

Finally, we note that evidence presented in the form of a stenographic transcript and a videotape cannot be any less helpful in enabling a jury to assess credibility than a bare transcript alone, read by the prosecutor. *See, e.g., Mancusi v. Stubbs,* 408 U.S. 204 (1972).

c. *Deposition Proceedings.* Appellants contend that the circumstances surrounding the instant depositions were sufficiently restrictive and oppressive so as to deny them effective cross-examination, representation by counsel, and due process. As the factual basis for this claim, appellants marshal a series of events which they allege coalesced to deprive them of constitutional protections. While the situation may not have been ideal, the defects do not approach constitutional infirmity.

Appellants present a generous list of alleged harassments impeding their investigation and the conduct of

the investigation while in Japan. At the outset (though appellants argue that the point is irrelevant), we note that none of the conditions imposed upon appellants and counsel were at the behest of the United States Government. Neither the unavailability of the witnesses nor the conditions in Japan were instigated with state connivance. There is no suggestion of active prosecutorial misconduct or even passive acquiescence in covertly welcomed developments.[9] *Cf. Douglas v. Alabama,* 380 U.S. 415 (1965). Indeed, counsel for the Government operated under identical restraints.[10]

Appellants strongly complain that they were denied adequate time while in Japan to investigate the case. The Government paid for the travel expenses of the defendants and their attorneys to attend the depositions, as the court was permitted to order under § 3503(c). Aside from complying with that discretionary court order, the Government had no statutory or constitutional responsibility to finance the prepar-

[9]Through State Department channels, the Government attempted to have certain conditions removed or relaxed. Those finally insisted upon were imposed by the Japanese government in the protection of its own interests and those of its citizens as it deemed necessary.

Geders v. United States, 425 U.S. 80 (1976), which held that a trial court order preventing a defendant in a federal criminal prosecution from consulting with his counsel during an overnight trial recess worked a deprivation of the sixth amendment right to counsel, is inapposite. The Court specifically limited its scrutiny to the trial context and did "not reach, and [did] not deal with, limitations imposed in other circumstances." *Id.* at 91.

[10]That the Japanese government was justified in considering the limitations as necessary security measures is beyond the review function of this Court. We note, however, that appellant Powell was a convicted felon in Japan, and appellant King had been arrested there for possession of 34 grams of heroin. The Japanese officials were particularly concerned with the flow of illegal narcotics traffic through their country. This background places the admittedly restrictive procedures into contextual perspective.

ation of the defense. Appellants' counsel had adequate time prior to the depositions to mount an investigation.[11] While the *appellants'* time in Japan and mobility once there was restricted by the Japanese government, there were no restrictions placed on *counsel's* freedom to travel or look into all aspects of the charges and deponents' backgrounds. Even within the United States there is no constitutional right for defendants in custody to be freed to aid in pretrial investigation efforts.

Appellants complain of an inability to confer with their counsel in sufficient privacy because the conference rooms at Yokosuka Prison and the hotel suites had been secured by Japanese authorities, and because they were under continuous guard. Aside from the admittedly tight security measures already noted, however, the record reveals no allegation of specific facts to buttress appellants' fears of electronic eavesdropping. *Cf. United States v. Alter,* 482 F.2d 1016 (9th Cir. 1973); *Cohen v. United States,* 378 F.2d 751 (9th Cir. 1967).

Appellants insist that a prerequisite to admissibility lacking in deposition testimony is the ambience of solemnity closely approximating a trial. *Cf. California v. Green,* 399 U.S. 149, 165 (1970) (Court noted that the admitted preliminary hearing testimony was "given under circumstances closely approximating those that surround the typical trial"). While the

[11]The Government's motion to take the depositions was granted in November 1974 and all of the deponents' prior statements in the possession of and known to the Government were turned over to the defense on or about November 22, 1974.

source of appellants' "solemnity" requirement is somewhat unclear, we think that the instant deposition complied with that requirement in meeting the specific interests enumerated in *Green:* the witnesses were under oath; defendants were represented by counsel with the opportunity for cross-examination; and the proceedings were before an authorized hearing officer who was equipped to take and preserve the testimony. *See id.* The entire record was then under the supervision and control of a United States District Judge. 18 U.S.C. § 3503(f); Fed.R.Civ.P. 30(c). We further note that the deponents were under an oath they believed to be valid and they agreed to be cross-examined by a battery of experienced counsel. The physical context of the prison with the security personnel present would surely contribute to "impressing [the deponents] with the seriousness of the matter and guar[d] against the lie . . . ." *Green,* 399 U.S. at 158.

In attacking the deposition circumstances as fundamentally limiting defense counsel's ability to conduct a cross-examination, appellants have misconstrued *Green.* Appellants cite the observation in *Green* that cross-examination at the prior preliminary hearing there in issue did "not appear to have been significantly limited in any way . . . ." *Id.* at 166. As part of the same sentence, however, the Court made clear that the focus of its scrutiny was on the possible limitation of the scope or nature of cross-examination. We find no indication that cross-examination was limited in the *Green* sense. Indeed, deposition cross-

examination is potentially broader and more revealing for purposes of discovery than trial testimony because the hearing officer merely records objections for later ruling by the court; the deponent is permitted to answer subject to later striking. Fed.R.Civ. P. 30(c).

Appellants cite the inability to recall deponents as further exacerbating appellants' due process and representation rights. This reasoning is premised on an alleged total inability to communicate with counsel. Appellants' analysis is faulty for two reasons. It first assumes that the failure to take advantage of available opportunities for conference would be vindicated upon our reviewing their fears of surveillance. We have rejected that premise. It second assumes incorrectly that inability to recall renders the initial testimony infirm. The deponents were subject to cross- and recross-examination "as would be allowed at the trial itself." 18 U.S.C. § 3503(d). Courts have upheld admission of prior testimony where the witness was not subject to recall. *See, e.g., Mancusi v. Stubbs,* 408 U.S. 204 (1972); *United States v. Ricketson,* 498 F.2d 367 (7th Cir.), *cert. denied,* 419 U.S. 965 (1974) (section 3503 deposition).

Other problems cited by appellants occur in the context of any deposition, within or without the United States. Appellants complain of an inability to interview the deponents prior to the examination, yet such an interview is not an absolute right; the choice to speak to defense counsel is the witness' alone. Appellants decry the failure of congruence between the

deponents' prior statements and their deposition testimony. The fleshing out of prior statements with hitherto unknown detail is the essence of deposition testimony; that the elaboration occurred at Yokosuka Prison should not detract from its admissibility. We think the obstacles to investigation were not significantly greater than if the witnesses had been available to testify in the United States.

We are cognizant of the procedural difficulties faced by the district court in managing a multiple-count, multiple-defendant trial, magnified by arranging for a deposition to be taken on foreign soil. This case involved several factual questions with respect to the exact nature of the proceedings in Japan during the deposition sojourn. In reviewing such questions of fact (even where arguably mixed with law), this circuit has adhered to the "clearly erroneous" rule. *United States v. Hart,* No. 74-3001, at 6-7 (9th Cir. July 22, 1976). We are unable to say that the district judge was clearly erroneous in concluding what the circumstances were, and we think that they complied with constitutional demands.

3. Waiver

During the cross-examination of deponent Adams, the first of the two witnesses, appellants and their counsel refused to participate further into the deposition proceedings. They were not present at all during the Gamble deposition. This decision was based upon an alleged inability to cross-examine the deponents because of the restrictive security measures imposed

by the Japanese. Appellants insist that this conduct cannot constitute an effective waiver of their objections to the taking and use of the deposition testimony under § 3503. We disagree, and uphold the district court's ruling that appellants' actions in departing from the depositions worked a waiver.

The major long-standing Supreme Court authority on waiver of fundamental rights is stated in *Johnson v. Zerbst,* 304 U.S. 458 (1938): "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *Id.* at 464. The determination of whether a right (in *Johnson,* the sixth amendment right to counsel) had been intelligently waived must depend upon a survey of the particular facts and circumstances surrounding the individual case. *Id.*

By absenting themselves from the proceedings, by failing to avail themselves of the opportunity to cross-examine the Government witnesses, even if under less than perfect conditions, the appellants intentionally and knowingly gave up both the right to be present and to object to future use of the testimony. It was a calculated act, undertaken with the knowledge of the potential consequences. Appellants ingeniously argue that they gave up no *existing* rights since alleged constitutional defects emasculated the rights in any event. Since we have already found the exercise of those rights not to have been unconstitutionally infringed upon, the waiver was effective.

Section 3503 itself supports this result. It provides that "failure, absent good cause shown, to appear

after notice and tender of expenses shall constitute a waiver of [the] right [to be present] and of any objection to the taking and use of the deposition based on that right." 18 U.S.C. § 3503(b). Since appellants can offer no reason for their absence other than the alleged harassments we have found not to be constitutionally infirm, they have not shown "good cause", and have waived objections to the further taking and use of deponents' testimony.[12]

B. *Severance.*

Prior to his first trial, King moved for severance of the parties and counts pursuant to Federal Rules of Criminal Procedure 12 and 14. The district court denied both this motion and subsequent motions for acquittal. King claims that the denial of his Rule 14 severance motion violated his rights to a fair trial and confrontation under the sixth amendment.[13] He bases this claim on the admission of the Adams and Gamble depositions, which contained statements allegedly made by co-defendant Powell implicating King in the charged criminal activities. The statements were admitted as co-conspirator exceptions to the hearsay rule. The depositions themselves were admitted under 18 U.S.C. § 3503.

Powell, as a criminal defendant, could refuse to take the stand at the joint trial, U.S. Const. amend.

[12]The legislative history casts some light on the application of the waiver provision: "The test for waiver is intended to be the same as for waiver of presence at trial. Voluntary absence from trial constitutes such waiver." 1970 U.S.C. Cong. & Admin. News 4007, 4025. *See* Taylor v. United States, 414 U.S. 17 (1973).

[13]King does not now challenge the denial of his motion for severance as an abuse of discretion.

V., and King could not compel his testimony or comment on its absence. *United States v. De La Cruz Bellinger,* 422 F.2d 723 (9th Cir.), *cert. denied,* 398 U.S. 942 (1970). *See* 18 U.S.C. § 3481; *Griffin v. California,* 380 U.S. 609 (1965). King claims he was therefore denied an opportunity by cross-examination to confront the witness against him, Powell.[14]

The issue before us is whether the confrontation clause was violated by admitting out-of-court declarations under the co-conspirator exception to the hearsay rule. We hold that it was not.

The primary concern of our inquiry must be to determine, "whether, under the circumstances, the unavailability of the declarant for cross-examination deprived the jury of a satisfactory basis for evaluating the truth of the extra-judicial declaration." *United States v. Adams,* 446 F.2d 681, 683 (9th Cir), *cert. denied,* 416 U.S. 940 (1971). In making this determination, we note that the confrontation clause may be violated by an extra-judicial statement which is admitted as an exception to the hearsay rule. *United States v. Snow,* 521 F.2d 730, 734 (9th Cir. 1975), *cert. denied,* 423 U.S. 1090 (1976); *United States v. Baxter,* 492 F.2d 150, 177 (9th Cir.), *cert. denied,* 416 U.S. 940 (1974); *Adams,* 446 F.2d at 683.[15]

[14]King did have the opportunity to cross-examine the two deponents, Adams and Gamble, in Japan. Powell is the declarant of some of the extrajudicial statements testified to at the deposition.

[15]We have expressly reaffirmed the rule of *Baxter* that "admissib[ility] under the co-conspirator exception does not automatically demonstrate compliance with the Confrontation Clause." *Snow,* 521 F.2d at 734 & n.2.

As construed by this Court in *Snow,* in *Dutton v. Evans,* 400 U.S. 74, 88-89 (1970), the Supreme Court enumerated several criteria which there indicated whether the requisite "satisfactory basis" for the jury's determination is present.

> (1) [T]he declaration contained no assertion of a past fact, and subsequently carried a warning to the jury against giving it undue weight; (2) the declarant had personal knowledge of the identity and role of participants in the crime; (3) the possibility that the declarant was relying upon faulty recollection was remote; and (4) the circumstances under which the statements were made did not provide reason to believe that the declarant had misrepresented the defendant's involvement in the crime.

521 F.2d at 734. We find that Powell's statements satisfy all of these criteria. In each instance, Powell was speaking of his then current dealings with King. Powell had knowledge of King and his role in these activities. Since Powell was speaking of current dealings there is little possibility that he was relying on faulty recollection. The circumstances were such that it is not likely that Powell would lie to Adams and Gamble, since he had no reason to anticipate their future testimony for the Government.

There is language in the decisions indicating that other factors may be involved in determining the admissibility of extra-judicial statements under the confrontation clause. *Dutton,* 400 U.S. at 87; *Snow,* 521 F.2d at 735-736. First among these is whether

or not the introduction of the statement will have a "'crucial' or 'devastating'" effect. In view of the large amount of other evidence substantiating King's activities as described by Powell, we do not regard Powell's statements as crucial or devastating. It is true that the bulk of this evidence is circumstantial, but such evidence is weighed on the same scale and laid before the jury in the same manner as direct evidence. *Holland v. United States,* 348 U.S. 121, 139-40 (1954); *United States v. Nelson,* 419 F.2d 1237, 1240-41 (9th Cir. 1969). Of the other factors mentioned, use of a coerced confession, prosecutorial misconduct, use of a paper transcript, and the wholesale denial of cross-examination were not present in the instant case.

The final factor mentioned, the effects of a joint trial, is particularly relevant here in that this portion of the appeal is based on the contention that one of those effects—the absence of King's ability to cross-examine Powell—violated King's rights under the confrontation clause. In *Dutton,* the Supreme Court did discuss four cases involving the potential for denial of cross-examination of a co-defendant inherent in a joint trial. Those cases, however, all focused on confessions by one co-defendant implicating the other, which were absolutely inadmissible as against the implicated co-defendant. *Roberts v. Russell,* 392 U.S. 293 (1968); *Bruton v. United States,* 391 U.S. 123 (1968); *Brookhart v. Janis,* 384 U.S. 1 (1965); *Douglas v. Alabama,* 380 U.S. 415 (1965). Here we deal with statements which would normally be ad-

missible against the implicated co-defendant, King, under a valid hearsay exception.[16]

We have already considered whether the confrontation clause was violated by the instant use of the co-conspirator hearsay exception, and we have held that it was not. The confrontation clause does not absolutely require cross-examination but rather safeguards of reliability. We think those safeguards were present here.

Furthermore, it is not clear that severance would have any beneficial effect for King. His counsel has only alleged, based on King's own assertion of innocence, that Powell would testify in his favor. From the information before us, it seems as conceivable that Powell would refuse to testify pending his appeal, or would even further implicate King, as that he would exculpate King or deny his earlier declarations.

The denial of the motion for severance is affirmed.

[16]Since we have held that the evidence here was not crucial or devastating, we need not comment on the strength of the dictum in *Dutton* and *Snow* indicating that if evidence is crucial or devastating, it could be absolutely barred from admission on confrontation clause grounds. No holding of any case brought to our attention has turned on the application of this standard. However, it is possible to read the Supreme Court's dictum in *Dutton* as casting a quantitative analysis into the context of several factors: *i.e.*, coerced confession, prosecutorial misconduct, paper transcript, denial of cross-examination, and joint trial. Thus, whether evidence is crucial or devastating may not be determinable in the abstract—as an independent factor—as the dictum in *Snow* may suggest. Rather, "'crucial' or 'devastating'" may be a standard against which evidence from one of the several contexts is compared, the admission of which, if below the threshold, would be true harmless error. *See* Chapman v. California, 386 U.S. 18 (1967); Herzog v. United States, 235 F.2d 664 (9th Cir.), *cert. denied,* 352 U.S. 844 (1956).

C. *Curative Instruction*

Some of the evidence against King was admitted under the co-conspirator exception to the hearsay rule.[17] For such evidence to be admitted, the government had to establish by independent evidence a prima facie case that the conspiracy which forms the basis of the exception in fact existed. *United States v. Spanos,* 462 F.2d 1012, 1014 (9th Cir. 1972); *Carbo v. United States,* 314 F.2d 718, 737 (9th Cir. 1963), *cert. denied,* 377 U.S. 953 (1964). *See Glasser v. United States,* 315 U.S. 60 (1942). King argues here that the district court erred in failing to give a requested cautionary jury instruction at the time the evidence was offered that extra-judicial declarations of one co-conspirator implicating another should not be considered against the other person unless independent, nonhearsay evidence establishes the existence of the conspiracy and his participation in it, beyond a reasonable doubt. The court instead reserved the instruction for the end of trial.[18]

The Government argues that all objections to use of the co-conspirator's statements testified to at the deposition were waived by appellant's absence therefrom, citing 18 U.S.C. § 3503(b) and *Johnson v.*

[17]Appellants' trial took place in April 1975, when the Federal Rules of Evidence were not yet in effect. Rule 801(d)(2)(E) classifies statements made by co-conspirators in the furtherance of the conspiracy as nonhearsay.

[18]Apparently at the second trial, just after the jury had been empaneled, the court offered to read all the instructions as to conspiracy. The defense objected, however, because the court did not offer to read *only* the curative instruction requested at the first trial, or all the instructions concerning, for example, the burden of proof. The instructions were then subsequently included in the jury charge.

Zerbst, 304 U.S. 458 (1938). The co-conspirator exception was not invoked only as to the testimony of deponents Adams and Gamble, however; the cautionary instruction was requested as to the testimony of witnesses present at trial. Moreover, King may have raised hearsay objections while present during the first part of the Adams deposition. Under § 3503(b), King waived objections to the taking and use of the deposition only to the extent that such objections depended on his right to be present. Thus the waiver may not be broad enough to eliminate King's objections.

King cites as persuasive authority—and urges this court to adopt—the Fifth Circuit rule of *United States v. Apollo,* 476 F.2d 156 (5th Cir. 1973), which recognizes

> a minimum obligation on the trial judge in a conspiracy case in which extra-judicial statements of alleged co-conspirators are proffered to give a cautionary instruction on the limited uses of hearsay testimony, explaining clearly to the jury the requirement that the conspiracy itself and each defendant's participation in it must be established by independent non-hearsay evidence which must be given either prior to the introduction of any evidence or immediately upon the first instance of such hearsay testimony.

Id. at 163. *See also United States v. Jennings,* 527 F.2d 862 (5th Cir. 1976); *United States v. Beasley,* 513 F.2d 309 (5th Cir. 1975); *United States v. Nelson,* 498 F.2d 1247 (5th Cir. 1974); *United States v. Jimenez,* 496 F.2d 288 (5th Cir. 1974), *cert. denied,* 420

U.S. 979 (1975). The *Apollo* court relied substantially upon *Lutwak v. United States,* 344 U.S. 604 (1953), as the source for the "minimum obligation" to give the curative instruction. In *Lutwak,* the Supreme Court stated:

> In the trial of a criminal case for conspiracy, it is inevitable that there shall be, as there was in this case, evidence as to declarations that is admissible as against all of the alleged conspirators; there are also other declarations admissible only as to the declarant and those present who by their silence or other conduct assent to the truth of the declaration. These declarations must be carefully and clearly limited by the court at the time of their admission and the jury instructed as to such declarations and the limitations put upon them. Even then, in most instances of a conspiracy trial of several persons together, the application of the rule places a heavy burden upon the jurors to keep in mind the admission of certain declarations and to whom they have been restricted and in some instances for what specific purpose.

Id. at 618-19.

The Government contends that the *Lutwak* language relied upon was mere dictum, and that in any case, the Fifth Circuit has restricted the *Apollo* rule to cases of minimally sufficient showings of the conspiracy's existence. *See United States v. Moore,* 505 F.2d 620 (5th Cir. 1974), *cert. denied,* 421 U.S. 918 (1975). In cases where independent nonhearsay evidence strongly establishes the conspiracy, the *Moore* court held that the jury may impute "acts and state-

ments to co-conspirators without restriction, and a cautionary instruction turns out to be a meaningless gesture." 505 F.2d at 624 (footnote omitted).

Both parties overlook our own circuit's analysis in *Carbo v. United States*, 314 F.2d 718 (9th Cir. 1963), *cert. denied*, 377 U.S. 953 (1964).[19] We reaffirm the reasoning of *Carbo*.

In conspiracy cases, the preliminary question of admissibility—the existence of the conspiracy and a defendant's participation in it—is often identical to an ultimate issue at trial. This coincidence in consideration of the conspiracy issue has led to confusion with respect to whether the judge or jury is responsible for determining the existence of the conspiracy for purposes of admitting a co-conspirator's statements.

In *Carbo*, this Court addressed and resolved the issue. *Carbo* involved extortion affecting commerce and conspiracy to extort in violation of the Hobbs Act, 18 U.S.C. § 1951. When the Government offered statements by members of the conspiracy against other alleged co-conspirators, the defense argued that the preliminary question was to be resolved by the jury upon proof beyond a reasonable doubt. We reasoned then that, were the defense's argument correct, there would be no occasion to resort to the declarations; the evidence would not be considered unless the defendant's guilt had already been resolved.

[19] *Carbo* was decided and the instant case was tried prior to the effective date of the Federal Rules of Evidence. For the present provisions, see Fed. R. Evid. 104 (preliminary questions).

Carbo, 314 F.2d at 736, *citing United States v. Dennis*, 183 F.2d 201, 230-31 (2d Cir. 1950) (Hand, J.), *aff'd*, 341 U.S. 494 (1951). We noted:

> To accept the problem as one of admissibility of evidence is to recognize that the declarations, if admissible, shall be considered by the jury *in reaching* its determination upon the issue of innocence or guilt. It will not do to tell the jury that it must reach its determination first.

Id. (emphasis in original). We also rejected giving the preliminary question to the jury to be decided by it upon the basis of a prima facie case rather than proof beyond a reasonable doubt, reasoning that the compartmentalization of distinct evidence weighing standards (even if cautiously isolated by instructions) was an impractical—and potentially prejudicial—burden. We therefore adopted the view of function allocation between judge and jury which assigns to the judge questions of fact determinative of admissibility.

> It is for the judge then, and not the jury, to determine the admissibility of the declarations. In making this determination the test is not whether the defendants' connection had by independent evidence been proved beyond a reasonable doubt, but whether, accepting the independent evidence as credible, the judge is satisfied that a prima facie case (one which would support a finding) has been made. Thereafter it is the jury's function to determine whether the evidence, including the declarations, is credible and convincing beyond a reasonable doubt.

Id. at 737.

The instruction requested and refused by the district court in *Carbo*[20] was substantially similar to the instruction requested—and given—here.[21] We did not hold the failure to give the *Carbo* instruction to be error. Indeed, in adopting the "orthodox" view of allocating functions between judge and jury we quoted with approval the following language from *Dennis:*

> The law is indeed not wholly clear as to who must decide whether [a co-conspirator's] declaration may be used; but we think that the better doctrine is that the judge is always to decide, as concededly he generally must, any issues of

[20]You will recall that testimony of acts and statements made by alleged co-conspirators in the absence of a defendant was received on a tentative basis in evidence. Such testimony was received subject to independent proof of the existence of the conspiracy and the absent defendant's knowing participation in the conspiracy. If you do not find, on independent proof, that a conspiracy existed and the absent defendant knowingly participated in the conspiracy, the tentative basis is destroyed and all such testimony must be ignored as to him.

A defendant's connection with a conspiracy must be established beyond a reasonable doubt, accordingly, by his own conduct and his own statements or declarations.

314 F.2d at 735.

[21]Whenever it appears beyond a reasonable doubt from the evidence in the case that a conspiracy existed, and that a defendant was one of the members, then the statements thereafter knowingly made and the acts thereafter knowingly done, by any person likewise found to be a member, may be considered by the jury as evidence in the case as to the defendant found to have been a member, even though the statements and acts may have occurred in the absence and without the knowledge of the defendant, provided such statements and acts were knowingly made and done during the continuance of such conspiracy, and in furtherance of some object or purpose of the conspiracy.

Otherwise, any admission or incriminatory statement made or act done outside of court, by one person, may not be considered as evidence against any person who was not present and did not hear the statement made, or see the act done.

Therefore, statements of any conspirator, which are not in furtherance of the conspiracy, or made before its existence, or after its termination, may be considered as evidence only against the person making them.

> fact on which the competence of evidence depends, and that, if he decides it to be competent, he is to leave it to the jury to use like any other evidence, without instructing them to consider it as proof only after they too have decided a preliminary issue which alone makes it competent.

Id at 737, *quoting Dennis,* 183 F.2d at 231.

We hold that the failure to give the requested instruction prior to the presentation of evidence perforce was not error.[22] To repeat such instructions several times in the course of trial would compound the fears of confusion recognized by Judge Hand in *Dennis* and this Court in *Carbo.* Indeed, appellant here may have benefited from the instruction received. Once the district judge made his prima facie determination, he nevertheless included in the jury charge an instruction on the reasonable doubt standard required preliminary to their consideration of co-conspirators' statements. If such instruction was error, it was harmless error.

Appellant's construction of *Lutwak,* incidentally, is also refuted by *Carbo.* When the *Lutwak* Court paused to observe that co-conspirators' declarations must be "carefully and clearly limited," it did so in the context of a declaration not in furtherance of the conspiracy, the introduction of which, by well-recognized doctrine, is absolutely limited to the declarant. *Carbo,* 314 F.2d at 738 n.26. In contrast, the introduction of a co-conspirator's declaration against

[22]We note that in the second trial, the district judge offered to read the requested instruction just after the jury was empaneled. *See* note 18 *supra.*

a nondeclarant defendant made in furtherance of the conspiracy is only conditionally forbidden. Once the prosecution has established its prima facie case of conspiracy through independant nonhearsay evidence, the nondeclarant defendant is no longer shielded. It was the separate issue of who decides whether that threshold has been established that was before this Court in *Carbo*.[23]

D. *Abuse of Discretion*

In the second trial, after deliberating for some time, the jury requested a copy of the Gamble deposition.

[23]Our reaffirmance of *Carbo* on the preliminary question issue is further supported by the teaching of Jackson v. Denno, 378 U.S. 368 (1964), which was also based upon a concern for jury confusion. *Jackson* stands for the proposition that, in admitting confession evidence, the preliminary determination that the confession was voluntary must be fully and independently made by the judge before it may be presented to the jury. We think that the same principle of preliminary fact determination applies to the co-conspirator's declaration context, for we read *Jackson* as holding that the preliminary question must be resolved by the appropriate standard prior to admission. In our case, only the appropriate preliminary standard differs: beyond a reasonable doubt as to confessions, prima facie showing as to co-conspirator's declarations. *But see* 1 J. Weinstein & M. Berger, WEINSTEIN'S EVIDENCE ¶104[05], at 104-43-44 (1976).

In *Jackson*, the Court disapproved the "New York" rule of voluntariness, by which the trial judge made the preliminary determination regarding confessions offered by the prosecution. According to that rule, if under no circumstances could the confession be deemed voluntary, the evidence was excluded. But if the evidence presented a fair question (*e.g.*, where the facts were disputed or where reasonable persons could differ over inferences to be drawn from undisputed facts) the judge received the confession and left to the jury, under cautionary instruction, the determination both of voluntariness and truthfulness. The Court approved the "orthodox" rule, where the judge solely and finally determines the voluntariness of the confession. It also left undisturbed the "Massachusetts" rule, where the jury may assess voluntariness only after the judge has fully and independently resolved the question against the defendant. We have no need to comment on the "Massachusetts" rule which governs the admission of co-conspirator's declarations in other circuits. *See* United States v. Apollo, 476 F.2d 156 (5th Cir. 1973), and its progeny.

The court refused, for fear of needlessly extending the deliberations. Over objections, the court did accede however, to the jury's request that portions of the Gamble deposition relating largely to King's involvement in smuggling heroin into the United States be reread. Shortly thereafter, the jury returned with the guilty verdicts.

Both sides accurately state the standard on review to be abuse of discretion. *See United States v. Baxter,* 492 F.2d 150, 175 (9th Cir. 1973), *cert. denied,* 416 U.S. 940 (1974). King argues, however, that singling out the reread testimony placed too much emphasis on it, with the rapidly ensuing verdicts as an indication of the prejudice.

Appellant King cites two cases in which the refusal to reread testimony was found not to abuse the trial court's discretion, both decisions noting a danger of overemphasis in rereading only portions of testimony. *Baxter, supra; United States v. De Palma,* 414 F.2d 394 (9th Cir. 1969), *cert denied,* 396 U.S. 1046 (1970). This Court has also upheld the replaying of tape-recorded evidence two times during deliberation. *United States v. Puchi,* 441 F.2d 697 (9th Cir.), *cert. denied,* 404 U.S. 853 (1971). We have been directed to no case where this Court has found an abuse in either the granting or refusing of the request by the trial court, and we find no abuse here.

The Government argues that the segments reread constitute only a small part of the evidence against King. King replies (pointing to little else) that the speed with which the jury reached its verdict after

hearing the testimony a second time attests to overemphasis. We think that other conclusions not inconsistent with careful consideration of the evidence as a whole are possible. The jury may have already reached a verdict and merely desired a confirming clarification on one point; the clarification on a point may have been the "straw that broke the camel's back" in swaying a verdict properly based on the totality of the evidence.

The discretion granted the trial judge is large, *De Palma, supra,* and determination of whether that large discretion was abused must turn on the circumstances of the individual case. *Baxter, supra.* We cannot say that the trial judge abused his discretion.

E. *Congress' Constitutional Authority under 21 U.S.C. § 959*

Appellants King (Counts Three and Four) and Powell (Counts Three, Four, and Five) were both convicted of unlawful distribution in Japan of heroin intended for importation into the United States, in violation of 21 U.S.C. § 959.[24] Adopted in 1970, the

[24]The statute provides in full:

§ 959. Manufacture or distribution for purposes of unlawful importation

It shall be unlawful for any person to manufacture or distribute a controlled substance in schedule I or II—

(1) intending that such substance will be unlawfully imported into the United States; or

(2) knowing that such substance will be unlawfully imported into the United States.

This section is intended to reach acts of manufacture or distribution committed outside the territorial jurisdiction of the United States. Any person who violates this section shall be tried in the United States district court at the point of entry where such person enters the United States, or in the United States District Court for the District of Columbia.

statute is expressly aimed at having extraterritorial effect, but King and Powell protest that its attempted reach exceeds the legislative power vested in Congress by the Constitution.

There is no constitutional bar to the extraterritorial application of penal laws. *Blackmer v. Unted States,* 284 U.S. 421, 436-38 (1932). Numerous decisions have upheld the authority of the United States to enact and enforce criminal laws with extraterritorial effect. *See e.g., Blacker, supra; United States v. Bowman,* 260 U.S. 94 (1922); *Strassheim v. Daily,* 221 U.S. 280 (1911); *United States v. Castillo-Felix,* No. 75-2915 (9th Cir. July 9, 1976); *United States v. Cotten,* 471 F.2d 744 (9th Cir.), *cert. denied,* 411 U.S. 936 (1973); *Rocha v. United States,* 288 F.2d 545 (9th Cir. 1961). Appellants concede that the only court which has dealt with the constitutionality of § 959 has held it constitutional, *United States v. Daniszewski,* 380 F. Supp. 113 (E.D.N.Y. 1974), but they question the reasoning underlying the opinion.

Both sides cite the same five principles of extraterritorial authority generally recognized under international law: the territorial, nationality, protective, universality, and passive personality principles. *See Rocha,* 288 F.2d at 549 n.4. Appellants argue that only the territorial principle (determining jurisdiction by reference to the place where the offense is committed) and the protective principle (determining jurisdiction by reference to the national interest injured by the offense) have been accepted as valid bases of authority by American courts, and attempt

to harmonize the substantial case law into one or the other of the two categories. Thus, they contend, only acts committed within the United States or conduct abroad that threatened American security, sovereignty, or operation of government functions have been—or can be—subject to federal law, and they argue that their acts—and the reach of § 959—do not qualify.

We think this argument fails. In upholding statutes with extraterritorial impact, courts have recognized that the territorial concept of jurisdiction is neither exclusive nor a full and accurate characterization of the powers of states to exercise jurisdiction beyond the confines of their geographical boundaries. *United States v. Rodriguez,* 182 F. Supp. 479, 488 (S.D. Cal. 1960), *aff'd sub nom. Rocha v. United States,* 288 F.2d 545 (9th Cir. 1961).

> From the body of international law, the Congress may pick and choose whatever recognized principle of international jurisdiction is necessary to accomplish the purpose sought by the legislation. The mere fact that, in the past, Congress may not have seen fit to embody in legislation the full scope of its authorized powers is not a basis for now finding that these powers are lacking.

182 F. Supp. at 491. While it may be true that several cases upholding extraterritorial jurisdiction involve some injury to the sovereign integrity of the United States, the extraterritorial effect of federal penal laws has not been limited in those cases.

Thus, even if appellants were able to reconcile all precedents into one or the other of the categories which they recognize, they have not established that authority under one of the other three principles would not be acceptable. Since both appellants are United States citizens, the nationality principle would apply: American authority over them could be based upon the allegiance they owe this country and its laws if the statute concerned as does § 959, evinces a legislative intent to control actions within and without the United States. *See, e.g., Blackmer v. United States,* 284 U.S. 421, 437 (1932); *United States v. Bowman,* 260 U.S. 94, 97-98 (1922); *The Apollon,* 22 U.S. (9 Wheat.) 362, 369-70 (1824); *United States v. Pizzarusso,* 388 F.2d 8, 10 (2d Cir.), *cert. denied,* 392 U.S. 936 (1968); *Rocha v. United States,* 288 F.2d 545, 548 (9th Cir. 1961); *United States v. Daniszewski,* 380 F. Supp. 113, 116 (E.D.N.Y. 1974).

Appellants attempt to distinguish these precedents away by arguing that they could have been, or were, also justified under the territorial or protective principles. Even were that so, however, that does not vitiate the courts' recognition of the nationality principle as a valid source of authority. We are not persuaded why we should strain our reading of these cases to reach appellants' desired conclusion.

In any event, appellants' prosecution for violating § 959 could also be justified under the territorial principle, since American courts have treated that as an "objective" tribunal principle. As expressed by the

Supreme Court in *Strassheim v. Daily,* 221 U.S. 280, 285 (1911):

> Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power.

See also United States v. Cotten, 471 F.2d 744, 749 (9th Cir.), *cert. denied,* 411 U.S. 936 (1973); *Rocha v. United States,* 288 F.2d 545, 548 (9th Cir. 1961). Since appellants' activity in Japan was intended to, and did, have an actual adverse impact in the United States—the further distribution of the heroin here—they can be held subject to American law as if they had acted within American territory.

We conclude that the jurisdictional reach of § 959 is properly within the scope of Congress' legislative power and that the statute is constitutional as applied to appellants.

F. *Sufficiency of Evidence*

Appellant Powell was charged in Count Eight with distribution of heroin and was found guilty of that charge by the jury in the first trial. Here he challenges the sufficiency of the evidence against him on that count.

On review of a sufficiency question, the court must view the evidence in the light most favorable to the Government, *Glasser v. United States,* 315 U.S. 60, 80 (1942), and the findings of the trier of fact may not

be set aside unless clearly erroneous. *United States v. Glover,* 514 F.2d 390 (9th Cir. 1975), *cert. denied,* 49 L. Ed. 2d 1189 (1976). Powell argues that this Court must determine whether "reasonable minds could find that the evidence excludes every hypothesis but that of guilt," citing *Lee v. United States,* 376 F.2d 98, 101 (9th Cir. 1967). The *Lee* formulation has been rejected as a jury guide in *Holland v. United States,* 348 U.S. 121, 137-38 (1954) because of its confusing nature. This circuit has found the *Lee* test incorrect as a guide for the reviewing court. *United States v. Nelson,* 419 F.2d 1237, 1242-44 (9th Cir. 1969). The proper test is whether the jurors could reasonably arrive at their conclusion. *Id.* at 1242-43.

Appellant does not challenge the fingerprint evidence linking him to the criminal activity of which he was convicted. Upon a review of the evidence, we believe that the jury could reasonably find as it did.

AFFIRMED.

No. 76-971

In the Supreme Court of the United States

OCTOBER TERM, 1976

ANDRE WILLIS KING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 1976. The petition for a writ of certiorari was filed on January 13, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the admission into evidence of videotaped depositions of two government witnesses who were unavailable at trial violated the Confrontation Clause of the Sixth Amendment.

2. Whether the district court was required to give a limiting instruction during the course of the trial regarding the use of co-conspirator statements.

STATEMENT

After a jury trial in the United States District Court for the Northern District of California, petitioner was convicted of conspiracy to import heroin unlawfully into the United States and to possess and distribute heroin, in violation of 21 U.S.C. 846 and 963 (Count I), and of two counts of unlawful distribution of heroin intended for importation into the United States, in violation of 21 U.S.C. 959 (Counts III and IV). He was sentenced to 15 years' imprisonment on Count I to be followed by a special parole term of nine years, and to ten years' imprisonment on each of Counts III and IV, to be followed by a special parole term of five years. The sentences imposed on Counts III and IV were concurrent to each other but consecutive to that imposed on Count I. The court of appeals affirmed (Pet. App. A).

The evidence at trial, the sufficiency of which petitioner does not dispute, revealed a scheme under which petitioner and other persons obtained heroin in Thailand, transported it through military cargo channels to Japan, and reshipped it from Japan to the United States for ultimate distribution.[1] Petitioner took part in planning the illegal operation, assisted in concealing shipments of heroin on the person of a courier, Gamble, picked up shipments of heroin on their

[1]Petitioner and three others—Kearney, Lemon and Powell—were indicted as co-conspirators; several other persons were named as unindicted co-conspirators. At the first trial, Powell and Lemon were convicted on various counts, but the jury was unable to reach a verdict as to the other counts and defendants. On retrial the jury acquitted Kearney but convicted petitioner and the other defendants on the remaining counts (Pet. App. 2).

arrival in Japan from Thailand, flew to the United States to oversee the sale of the heroin, and shared substantially in the proceeds of the operation.

The government's proof rested in substantial part upon the testimony of two unindicted co-conspirators, Adams and Gamble. Neither of those witnesses was available to testify at trial because both were serving terms of imprisonment at Yokosuka Prison in Japan for violations of Japanese narcotics laws (Pet. App. 4).[2] On October 25, 1974, therefore, the government moved pursuant to 18 U.S.C. 3503 for leave to take videotaped depositions of Adams and Gamble in Japan (R. 12-24).[3] The district court granted the motion (R. 57-60), and the defendants and their counsel, including petitioner, traveled to Japan at government expense to participate in the depositions, which were set to be taken before an American consular officer at Yokosuka Prison. The Japanese government had, however, imposed certain restrictions on the defendants' movements while in Japan and on the deposition procedure.[4] The court of appeals described these restrictions and the deposition procedure as follows (Pet. App. 6-8):

[2]Subpoenas had been served upon Adams and Gamble at Yokosuka Prison, but the prison warden would not permit the two men to travel to the United States to honor the subpoenas (Pet. App. 4 n. 2).

[3]The statute is set out at Pet. App. 4-6 n. 3.

[4]As the court of appeals noted (Pet. App. 16 n. 10), the Japanese officials were apparently concerned with the flow of illegal narcotics traffic through their country and with the prior involvement of the defendants in that traffic. Defendant Powell had been convicted *in absentia* in Japanese court on September 14, 1972, of the felony of unlawfully possessing morphine, and petitioner had been arrested by the Japanese authorities on August 31, 1972, for possessing 34 grams of heroin (R. 386).

[The Japanese government] required that the defendants arrive together no earlier than January 20, 1975, and that the depositions begin the next day, though defense counsel protested that more time was needed to investigate and prepare for cross-examination. Defendants were taken from the airport to rooms prepared for them and they were guarded throughout their entire stay. They were confined to their rooms except for the trips to the prison for the deposition sessions, and they were not allowed to telephone or otherwise communicate with anyone else in Japan. They and their room were frequently searched. They could confer with their attorneys initially only in their own rooms, but subsequently in counsel's rooms as well. There were also rooms set aside for consultation purposes at the prison. The defendants and their attorneys could not speak privately with the deponents prior to their examinations, and a rigid daily schedule was set for the depositions.

Defense counsel vigorously objected to these conditions, and American consular officials attempted to have them relaxed, but the Japanese government would not relent. Claiming that the circumstances were intolerable, defendants and their counsel withdrew on the fourth day during the Adams' deposition and returned to the United States. The Government continued under the restrictions, taking the remainder of Adams' deposition and all of Gamble's after the defense's departure.

The district court admitted the deposition videotapes over petitioner's objections, and the court of appeals upheld their admission in a thorough opinion upon whch we rely (Pet. App. A).

ARGUMENT

1. Petitioner contends (Pet. 20-24) that the introduction of Adams' and Gamble's depositions violated the Confrontation Clause of the Sixth Amendment. He asserts first that depositions "can never meet confrontation requirements" and thus that 18 U.S.C. 3503 and Fed. R. Crim. P. 15 are unconstitutional on their face (Pet. 22). As the court of appeals held, however (Pet. App. 8-13), that contention is contrary to a long line of decisions of this Court beginning with *Mattox* v. *United States*, 156 U.S. 237, and extending to *Mancusi* v. *Stubbs*, 408 U.S. 204, where the Court held that the introduction of testimony given at an earlier trial of the defendant by a witness no longer in the country did not violate the Confrontation Clause so long as the witness was unavailable to testify at the second trial. See also *California* v. *Green*, 399 U.S. 149, 165-166.

In accordance with the principles of those cases, 18 U.S.C. 3503(f) conditions use of the deposition at trial upon a prior showing that the deponent is unavailable to testify at trial. Moreover, the statute affords a defendant the right to be present (at government expense) at the taking of the deposition, to be represented there by counsel, and to exercise full rights of cross-examination. It therefore clearly satisfies the constitutional standard. See *United States* v. *Ricketson*, 498 F. 2d 367 (C.A. 7), certiorari denied, 419 U.S. 965; *United States* v. *Singleton*, 460 F. 2d 1148 (C.A. 2), certiorari denied, 410 U.S. 984; *United States* v. *Carter*, 493 F. 2d 704 (C.A. 2).

Petitioner argues, however, that the circumstances in which the depositions were taken in this case effectively deprived him of the right to cross-examine the deponents and asserts that the combination of "intimidating circumstances surrounding the depositions" and the space

and time restrictions imposed on the deposition format made it impossible for defense counsel to ask "informed and intelligent questions—based on an adequate opportunity to investigate and discuss testimony with the accused" (Pet. 12, 24).

Petitioner's various complaints about the circumstances surrounding the depositions do not demonstrate a deprivation of his right to confrontation and were correctly rejected by the court of appeals, which held that "[w]hile the situation may not have been ideal, the defects do not approach constitutional infirmity" (Pet. App. 15).[5] The objection that the defendants did not learn until their arrival in Japan that they would not have the time they desired to conduct a pre-deposition investigation there (Pet. 22) overlooks the fact that the arrival and deposition schedules were imposed by the Japanese government and were beyond the control of the United States government, as the unsuccessful attempts to persuade the Japanese to relax their requirements demonstrate. Moreover, as the court of appeals noted (Pet. App. 17), criminal defendants, even in the United States, have no constitutional right personally to conduct pre-trial investigations, and defense counsel, who had been aware of the government's intention to depose the witnesses for two months, had ample time and freedom from restraint to conduct whatever investigation in Japan they deemed appropriate.[6]

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[5]This argument, moreover, involves an essentially factual issue which two lower courts have already resolved against petitioner; there is no reason for this Court to review those determinations. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635; *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275.

[6]Furthermore, the government paid for counsel's travel expenses. Petitioner's claim that his counsel was dependent on "petitioner's familiarity with the language and relevant locales in Japan" (Pet. 22) simply asserts a type of difficulty that frequently confronts defendants and their counsel, even in the United States, but does not establish a constitutional deprivation or a constitutional right of defendants charged with conduct occurring in part outside the country freely to accompany their lawyers in wide-ranging investigations around the globe. Moreover, the claim must be viewed in light of the fact that petitioner and two of his co-defendants were married to Japanese nationals and had relatives by marriage living in Japan (R. 388).

Petitioner's dissatisfaction with the ambiance of Japanese interrogation rooms and hotel facilities (Pet. 23-24) does not demonstrate that petitioner and his counsel were restrained from cross-examining the witnesses as fully as they desired. The hearing officer imposed no limitations on the number or type of questions defense counsel could ask.[7] Moreover, the prosecutors worked under the same conditions as the defense, and, contrary to petitioner's suggestion (Pet. 24), conference rooms were set aside for the defense team at the prison, where the defendants and their counsel conferred privately during the depositions (R. 401).[8]

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[7]Petitioner alleges that the hearing officer "refused to rule on objections" (Pet. 24). But the district court later ruled on the objections, sustaining some and overruling others (R. 436-440). Moreover, the deferral of ruling on the objections was of considerable potential benefit to the defense, as the court of appeals noted (Pet. App. 18-19): "[D]eposition cross-examination is potentially broader and more revealing for purposes of discovery than trial testimony because the hearing officer merely records objections for later ruling by the court; the deponent is permitted to answer subject to later striking. Fed. R. Civ. P. 30(c)."

[8]Furthermore, as the court of appeals noted (Pet. App. 7), while the defendants initially could confer with their counsel only at the hotel in their own rooms, they were subsequently permitted to confer in counsel's rooms as well, and, contrary to petitioner's assertion (Pet. 23), to confer there privately. And as the court of appeals correctly held (Pet. App. 17), there is no basis in the record to support petitioner's "opinion" (Pet. 13, 23) that it was unsafe to confer either at the prison or the hotel for fear of electronic eavesdropping.

In short, the procedures used in this case complied with 18 U.S.C. 3503 and did not deprive petitioner of his constitutional right to confrontation. Indeed, since the use of videotapes in this case enabled the jury not only to hear the witness' testimony but also to observe their demeanor, the procedures were at least as consistent with the Sixth Amendment as the mere reading of prior testimony of an unavailable witness, which this Court upheld in *Mancusi* v. *Stubbs, supra.*

2. a. Petitioner contends (Pet. 25) that the trial court erred in failing to instruct the jury, before the introduction of statements by petitioner's co-conspirators, that it could not consider the statements as evidence against petitioner unless the trial disclosed evidence independent of the statements that established the existence of the conspiracy and each defendant's participation in it beyond a reasonable doubt (see Pet. App. 32 n. 21). The trial court gave such an instruction at the conclusion of the trial, but petitioner insists that the court erred in not giving the instruction before the statements were admitted.

The court of appeals correctly rejected petitioner's claim. First, whether co-conspirator statements are admissible is an evidentiary question to be determined by the trial court, and the admissibility of such statements turns upon the court's determination whether independent evidence adequately establishes the existence of the conspiracy and the defendant's participation in it.[10] Fed. R. Evid. 104(a),

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[10]While the circuits are somewhat in conflict with respect to the quantum of independent evidence necessary to permit the admission of co-conspirator statements (compare, *e.g., United States* v. *Vaught*, 485 F. 2d 320 (C.A. 4), and *Carbo* v. *United States*, 314 F. 2d 718 (C.A. 9), certiorari denied, 377 U.S. 953, with *United States* v. *Wiley*, 519 F. 2d 1348, 1350-1351 (C.A. 2), certiorari denied *sub nom. James* v. *United States*, 423 U.S. 1058, and *United States* v. *Trotter*, 529 F. 2d 806, 812

801(d)(2)(E). Accordingly, as the Ninth Circuit held in *Carbo* v. *United States*, 314 F. 2d 718, certiorari denied, 377 U.S. 953, if the trial court determines that the statements are admissible it is not required to instruct the jury at all concerning the quantum of proof necessary to permit the statements to be considered.

Even if, as some courts apparently believe, the jury is to determine the facts necessary to establish admissibility, the instructions by the trial court here at the conclusion of the trial assigned the jury this task under standards far more stringent than petitioner was entitled to.[11] The court's failure to instruct the jury before any statement was introduced that it was to be considered conditionally and was to be erased from their minds if proof independent of the statements failed to establish the conspiracy and petitioner's role in it by the end of the trial did not impair the jury's function; indeed, giving such conditional instructions would tend hopelessly to confuse the jury by requiring

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(C.A. 3)), the appropriate standard is not at issue here, since independent evidence in this case amply established the conspiracy and petitioner's participation under any of the suggested tests. Thus, much of the testimony linking petitioner to the conspiracy and distribution was not hearsay but eyewitness observation of, for example, petitioner's participation in the opening and testing of heroin (Deposition of Adams, pp. 81-91), petitioner's statements directly to a witness that he was going to fly to Thailand to secure heroin (*id.* at 103-109), and his discussion with the witness and others of the sale of the heroin in California (Deposition of Gamble, pp. 42-44).

[11]The instruction given by the court conferred a greater benefit than the law requires, since the jury was told that it could consider the hearsay statements against petitioner only if it made a preliminary determination that evidence apart from the hearsay established the conspiracy and petitioner's role in it beyond a reasonable doubt. As the court of appeals noted, under the theory of the instruction given "there would be no occasion to resort to the declarations; the evidence would not be considered unless the defendant's guilt had already been resolved" (Pet. App. 30).

it, in the court of appeals' words (Pet. App. 31), to try to "compartmentaliz[e] * * * distinct evidence weighing standards" during the course of the trial.[12]

b. Petitioner's assertion (Pet. 25) that review of the decision below is warranted to resolve a conflict among the circuits is incorrect. The purported conflict is based primarily on the decision of the Fifth Circuit in *United States* v. *Apollo*, 476 F. 2d 156, 162, where, in the context of a conspiracy prosecution with "marginally sufficient nonhearsay evidence" of the conspiracy, the court held that cautionary instructions must be given either at the beginning of the trial or the first time hearsay statements are introduced.[13]

The substantial independent evidence of the conspiracy and petitioner's role in it distinguishes *Apollo* from the

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[12]Moreover, since the admissibility of the hearsay statements against petitioner was clearly established (see note 10, *supra*), the court of appeals correctly held that any failure to give a conditional cautionary instruction during the trial, if erroneous, was harmless error (Pet. App. 33).

[13]*United States* v. *Buschman*, 527 F. 2d 1083 (C.A. 7), cited by petitioner (Pet. 25), in fact supports the decision below. There the court clearly rejected the *Apollo* rule, held that the decision of when to issue a requested cautionary instruction was within the discretion of the trial court, and upheld the conviction even though, as here, the instruction was given at the end of the trial.

Although *United States* v. *Honneus*, 508 F. 2d 566 (C.A. 1), certiorari denied, 421 U.S. 948, also relied on by petitioner, purported to adopt the *Apollo* rule in the First Circuit, the court in that case held that the failure to give an adequate cautionary instruction at any time in the trial was not plair error requiring reversal in the absence of objection. See also *United States* v. *DeJesus*, 520 F. 2d 298 (C.A. 1), certiorari denied, 423 U.S. 865. Moreover, the First Circuit has recently recognized that the admissibility of co-conspirator statements is an evidentiary question for the court under the Federal Rules of Evidence, and that its contrary assumption in *Honneus* is not correct under the Rules. *United States* v. *Petrozziello*, 548 F. 2d 20, 22-23.

instant case, as subsequent Fifth Circuit decisions indicate. Thus, in *United States* v. *Leaman*, 546 F. 2d 148, 150 (C.A. 5), the court limited its holding in *Apollo* to the "extraordinary circumstances" of that case, observing that "the evidence of Apollo's connection with the conspiracy was entirely dependent upon hearsay statements of coconspirators." See also *United States* v. *Moore*, 505 F. 2d 620 (C.A. 5), certiorari denied, 421 U.S. 918. Moreover, since the court below held that even if the timing of the instructions were error, the error was harmless (Pet. App. 33), there is no conflict between the decision here and *Apollo*.

In any event, we submit that as a principal of general application, the *Apollo* rule is plainly erroneous. *Apollo* incorrectly relied on *Lutwak* v. *United States*, 344 U.S. 604, for the proposition that limiting instructions are required before the introduction of any co-conspirator statements. The statements at issue in *Lutwak*, however, were made after the conspiracy had ended and thus, under settled law, were admissible only against the declarant and not against co-conspirators. The Court's holding that cautionary instructions are necessary at the time of their admission was clearly limited to those declarations that as a matter of law are not admissible against one or more of the defendants. 344 U.S. at 619. The Court did not hold that the issue of admissibility is for the jury to decide, that a cautionary instruction is necessary when a statement is admissible against the defendant, or that a conditional cautionary instruction is required if facts have not yet established the extent to which the statement may be admissible.

However, since the Fifth Circuit has indicated a substantial withdrawal from the broad application of the *Apollo* rule and since the instant case is in any event distinguishable, further review of the issue in the context of this case is unnecessary.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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